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Supreme Court of the United States

OCTOBER TERM, 1931.

No. 171.

FIRST NATIONAL BANK OF BOSTON, Executor of the Estate of Edward H. Haskell, Deceased,

Appellant,

against

STATE OF MAINE.

Appellee.

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE.

MOTION AND BRIEF OF RUSSELL L. BRADFORD, AS AMICUS CURIAE, AND ON BEHALF OF THE CITY BANK FARMERS TRUST COMPANY.

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FIRST NATIONAL BANK OF BOSTON, Executor of the Estate of Edward H. Haskell, Deceased,

Appellant,

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STATE OF MAINE,

Appellee.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

MAY IT PLEASE THE COURT:

The undersigned, as counsel for City Bank Farmers Trust Company, as Executor, respectfully moves this Honorable Court for leave to file the accompanying brief in this case as *amicus curiae*.

RUSSELL L. BRADFORD,
Counsel for CITY BANK FARMERS TRUST COMPANY, As Executor,
Amicus Curiae.

Supreme Court of the United States,

OCTOBER TERM, 1931.

No. 171.

FIRST NATIONAL BANK OF BOSTON, Executor of the Estate of Edward H. Haskell, Deceased,
Appellant,
against
STATE OF MAINE,
Appellee.

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE.

BRIEF OF AMICUS CURIAE.

This brief, by permission of the Court and with the consent of counsel for the respective parties, is filed by the undersigned as *amicus curiae,* and on behalf of the City Bank Farmers Trust Company of New York as Executor of the Last Will and Testament of Virgil P. Kline, Deceased, and also on its behalf as executor of other estates, wherein the question here presented is involved.

Facts.

The facts in the case in suit are set out in the transcript of record, and in the opinion of the Supreme Judicial Court of Maine (R. 11), as well as in the brief of the appellant.

A Brief Resume of the Facts in Respect of One of the Cases Represented by the Undersigned.

Virgil P. Kline died a resident of the State of Oklahoma, leaving a Last Will and Testament wherein he named and nominated the City Bank Farmers Trust Company as Executor thereof. The greater portion of the estate of said Virgil P. Kline consisted of stocks of corporations organized under the laws of the State of Ohio, the certificates of stocks of which said corporations, however, were physically located in the City of New York. In due course the Oklahoma inheritance tax was paid upon all the intangible personalty owned by the decedent including shares of Ohio corporations. The State of Ohio also demanded an inheritance tax upon the value of the shares of the Ohio corporations.

An appeal from the tax determined by the State of Ohio in this respect was taken to the courts of Ohio and the issue here presented is now pending in the Supreme Court of Ohio, the lower courts having upheld as legal and constitutional the tax sought to be collected by the State of Ohio.

The Issue.

The issue presented in the case in suit while a very narrow one is nevertheless a very important one. It presents the question of whether property may be subjected to two or more taxes by the several states, and more particularly presents the question whether shares of corporate stocks (common or preferred) are so different in their characteristics from other intangibles as to render them subject to a different rule of law.

The argument of this brief in support of the appellant's contention that the State of Maine may not under the Fourteenth Amendment appropriately impose a

transfer inheritance tax upon stocks of a Maine corporation owned by a nonresident decedent and transferred at death pursuant to the laws of another State, will be addressed to the following:

POINT I.

Corporate stocks should stand upon the same footing as other intangible personalty, and certainly should not be the only form of property to bear the burden of double or multiple taxation.

The question of the taxation of property has not been always free from perplexity and, at times, confusion. This has been true in respect of direct or property taxes, as well as in respect of excises or indirect taxes. The legality of taxation revolves around the issue of situs of the property sought to be taxed, and around a consideration of power. Situs has its antecedent in the concept location. The question of power to tax is inherent in the question of situs. Tax laws in respect of real property have always been settled. Real property bears a tax only to the jurisdiction wherein it is located. It may be taken as fundamentally true that the question of the power to tax real property depends upon the fact of situs or location, and therefore the power does not exist as to real property located outside the taxing jurisdiction. This is true in respect of all kinds of taxes.

The law in respect of the taxation of tangible personalty for property taxes has now been definitely settled (*Union Refrigerator Co.* v. *Kentucky*, 199 U. S. 194) as it has been for the purpose of death duties (*Frick* v. *Pennsylvania*, 268 U. S. 473). We think the authorities are

clear to the effect that if there be no situs within the taxing jurisdiction, there is no power to tax.

The rule as to intangibles, certainly so far as notes, bonds, cash, choses in action, etc. are concerned, we think, is now definitely settled (*Farmers' Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204; *Baldwin* v. *Missouri,* 281 U. S. 586; *Beidler* v. *South Carolina Tax Commission,* 282 U. S. 1; *Blodgett* v. *Silberman,* 277 U. S. 1; *Rhode Island Trust Co.* v. *Doughton,* 270 U. S. 69, in respect of death duties and inheritance taxes; and *Kirtland* v. *Hotchkiss,* 100 U. S. 491; *Fidelity, etc. Co.* v. *Louisville,* 245 U. S. 54; *Brooke* v. *City of Norfolk,* 277 U. S. 27, and *Safe Deposit & Trust Co. of Baltimore* v. *Virginia,* 280 U. S. 83, in respect of property taxes). But this issue thus settled by the decisions is not based upon the actuality of situs, but upon the invocation of the ancient maxim of *mobilia sequuntur personam.*

The application of the maxim (whether a rule of law or not) may be considered as necessary to convenience, and this is so basically because intangibles technically cannot be said to have a location or situs (See *Farmers' Loan & Trust Company* v. *Minnesota, supra,* p. 211). In this aspect a situs must be attributed to such intangibles for purposes of taxation as well as for the purpose of determining property rights. Without such attribution there would be confusion in respect of property rights and devolution as well as taxes. The same property or asset might be taxable in at least four different localities (See *Farmers Loan and Trust Co.* v. *Minnesota, supra,* at pp. 209-210). The rate of tax, quadrupled, could be sufficiently high to absorb the property. Combined, the taxes could, indeed, exceed the value of the thing taxed. Which jurisdiction then should have priority?

This Court has decided that intangibles have a situs for tax purposes (as they have for devolution) at the domicile of the owner (*Blodgett* v. *Silberman, supra.* But

cf. *Baker* v. *Baker, Eccles & Co.*, 242 U. S. 394 (1917)). Certainly, for tax purposes, if the intangibles have not acquired a "situs for taxation other than at the domicile of their owner" when "they have become integral parts of some local business" (*Beidler* v. *South Carolina Tax Commission*, 282 U. S. 1, 8 (1930)) intangibles, for *ad valorem* personal property taxes, may be subject to tax only at the domicile of the owner (*Kirtland* v. *Hotchkiss, supra; Fidelity, etc. Co.* v. *Louisville, supra*); and this is true also in respect of a trustee-owner (*Brooke* v. *City of Norfolk*, 277 U. S. 27 (1928); *Safe Deposit & Trust Co.* v. *Virginia*, 280 U. S. 83 (1929)); and similarly for inheritance taxes or death duties (*Farmers' Loan & Trust Company* v. *Minnesota, supra; Baldwin* v. *Missouri, supra; Beidler* v. *South Carolina Tax Commission, supra*).

The question of the effect of a separate business situs of intangibles upon the problem of multiple taxation was reserved in *Farmers' Loan & Trust Co.* v. *Minnesota*. In *Beidler* v. *South Carolina Tax Commission, supra*, Mr. Chief Justice Hughes at p. 8 said:

> "In *Farmers Loan & Trust Company* v. *Minnesota, supra*, this Court reserved the question of business situs, saying: '*New Orleans* v. *Stempel*, 175 U. S. 309, *Bristol* v. *Washington County*, 177 U. S. 133, *Liverpool & L. & G. Ins. Co.* v. *Orleans Assessors*, 221 U. S. 346, recognize the principle that choses in action may acquire a situs for taxation other than at the domicile of their owner if they have become integral parts of some local business. The present record gives no occasion for us to inquire whether such securities can be taxed a second time at the owner's domicile'."

For *ad valorem* personal property taxes it therefore may be said that if the intangibles have acquired a business situs separate from the domicile of the owner, it is a reserved question whether such intangibles could be

taxed again "at the owner's domicile". But in respect of death duties (excises) such intangibles may be taxed at the domicile of the owner upon the transfer thereof by death. (See *Blodgett* v. *Silberman, supra,* at pp. 10-11).

In *Farmers' Loan & Trust Co.* v. *Minnesota, supra,* at p. 211, the Court said:—

> "While debts have no actual territorial situs we have ruled that a State may properly apply the rule *mobilia sequuntur personam* and treat them as localized at the creditor's domicile for taxation purposes. Tangibles with permanent situs therein, and their testamentary transfer, may be taxed only by the State where they are found. *And, we think, the general reasons declared sufficient to inhibit taxation of them by two States apply under present circumstances with no less force to intangibles with taxable situs imposed by due application of the legal fiction.*" (Italics ours.)

We therefore may take it as settled that the power of the taxing authority to tax property is limited to the taxation of property within its jurisdiction; and that to tax an event or excisable occasion the taxing authority must have control or jurisdiction over the event or act. This is true without variation in respect of real property and tangible personalty. It is true in respect of intangibles, such as notes, bonds, cash, choses in action, etc., as we have seen above. The basic thought underlying this principle likewise should have its application to stocks. That stocks are "intangibles" is obvious. (See *Blodgett* v. *Silberman,* supra, at p. 17).

There is no sound distinction to be drawn between bonds, notes, other choses in action, and stocks. True, the issue of whether stocks may bear a multiple tax by different taxing authorities assessing a tax "on different

and inconsistent principles'' has not the definite crystallization of court decisions that bonds, notes and other choses in action have. Nevertheless stocks are as much a part of the wealth of the country as are bonds or debts. The same underlying factors of present day business conditions apply equally to this class of intangibles as they do to other classes of intangibles.

As Mr. Justice McReynolds said:—

> ''Primitive conditions have passed; business is now transacted on a national scale. A very large part of the country's wealth is invested in negotiable securities whose protection against discrimination, unjust and oppressive taxation, is matter of the greatest moment.'' (*Farmers Loan & Trust Company* v. *Minnesota,* supra, at pp. 211-212).

As much of the wealth of this country is invested in stocks of corporate business, commercial and industrial concerns as is invested in bonds, notes or debts. Corporate enterprise in financing and re-financing sometimes do so by the issue of preferred stock (whether redeemable or not) and at other times by the issuance of bonds. It frequently is a matter of indifference which method is used,—a matter of indifference to the corporation as well as to the purchaser of the stock or the bonds. So far as the contributor to the corporation (that is the purchaser) is concerned, his wealth and the value of his asset is the same whether it be reflected in a paper instrument called ''preferred stock'' or a paper instrument called a ''bond''.

But if the characteristics of stock as an intangible are so different from those of bonds as intangibles, then corporate re-financing by the use of stocks would subject the holders thereof to a possible double or multiple tax as contradistinguished from the situation that would obtain if there were an issue of bonds. Are the characteris-

tics so definitely different? We suggest that the difference between the power of the State in granting the corporate franchise to control the situs of stock and the power of the State granting the corporate franchise to control the situs of the bonds issued by that corporation is too shadowy to predicate thereupon a separate distinct rule of taxation rendering the one subject to double or multiple taxation and the other to a single tax.

Modern times and economic conditions are repellant to such a separation for the purposes of taxation.

Much of the wealth of this country, certainly much of the business, commercial and industrial pursuits of this country, are conducted through corporate organization. The capital employed by the corporation, whether acquired by sale of preferred or common shares of the corporation or by sale of bonds or notes of the corporation come from all quarters of the nation,—indeed, from all the world.

The trend of the times is against drawing distinctions between forms of "intangibles" as much so as drawing distinctions between forms of "tangibles".

If the principle that intangible property in the present day and in the light of present economic conditions, and the worldwide interrelation of business and commerce, should have the same protection from double taxation that tangible property has, then it follows necessarily that this principle, to have any practical force and benefit, should comprehend all intangibles and not just some species of intangibles. The practical beneficial effect of the principle would be nullified if one particular species of intangibles (a species in which much of the wealth of the nation is invested) was left outside open to attack by the tax laws of several of the States.

While there is dicta, the implication from which suggests that stocks may be taxable at the domicile of the corporation and, indeed, by two or more taxing jurisdic-

tions (*Frick* v. *Pennsylvania*, supra, at p. 497, and *Rhode Island Hospital Trust Co.* v. *Doughton*, supra, at p. 81), there is a definite decision (see *Rhode Island Hospital Trust Co.* v. *Doughton* case) that a state wherein the corporation has its property, if it be neither the state of incorporation nor the state of domicile of the owner of the property, may not impose an excise upon the transfer of the stock upon the death of the owner. Yet practically and broadly (sheer technicalities aside) that state in all probability should have even a greater right to impose a tax than the state of incorporation.

The state of incorporation has a full right to impose such taxes as it thinks appropriate upon the corporation. Any *quid pro quo* due the state for the services of the state and protection rendered by the state of incorporation should be, and in most cases is, exacted by that state from the corporation. The state may even go so far as to impose an *ad valorem* personal property tax upon the stock of that corporation even though owned by nonresidents, if the tax so imposed is in lieu of all other taxes upon the corporation. (Cf. *Susquehanna Power Co.* v. *State Tax Commission of Maryland*, 283 U. S. 297). This would be so in the case of a tax upon stocks of a corporation (whether owned by residents or nonresidents) in lieu of taxes upon the corporation itself; in other words, a franchise tax or a tax in effect upon the property of the corporation, but in form one upon the stock. (*Susquehanna Power Co.* v. *State Tax Commission*, supra, at p. 299). *Corry* v. *Baltimore*, 196 U. S. 466, we think should be read in the light of the *Susquehanna Power Co.* v. *State Tax Commission of Maryland* decision.

But reason stops with the control of the state over the corporation. True, the state of incorporation may define the rights of the shares in such corporation, but similarly the state of incorporation may define the rights

inhering in bonds issued within, but sold without, the jurisdiction of that state.

If we accept the principle that the taxation of intangibles is confined to a single taxing authority, as we must of tangibles and immovables, it follows that the only question to be answered with respect to stocks is what taxing authority shall be deemed to have jurisdiction. The state wherein the corporation owns its property or conducts its business as contradistinguished from the state of incorporation, is eliminated by virtue of the decision in *Rhode Island Hospital Trust Co.* v. *Doughton,* supra.

The taxes involved in the *Corry* case and in the *Susquehanna Power Co.* case were property taxes, and had to do with the jurisdiction of the state over the corporation, and through the corporation over the stock thereof. Even so, stock may be transferred without the state. As between transferror and transferee, the transfer is valid and complete without the intercession or use of the functions of any of the rules or laws of the state of incorporation. (The mere question of registration is "an immaterial circumstance"). It may be that for personal property taxes (direct taxes) the state of incorporation appropriately may subject the stock owned by a nonresident to tax. (See *Tappan* v. *Merchants' National Bank,* 19 Wall. 490—but consider the provisions of R. S. 5219 applying to the taxation of national banks or the stocks thereof).

We think in view of the quite obvious desirability of not burdening property or wealth with duplicate and multiple taxation that to permit corporate stock, even for property taxes, to be taxed at the state of incorporation would be regrettable. But the basis of jurisdiction for an *ad valorem* personal property tax or for a corporate franchise tax could have no pertinency to a tax upon "succession" or "transfer" of stock owned by a

nonresident of the taxing state and transferred under the laws of another state.

The citations of *Corry* v. *Baltimore,* supra, and *Susquehanna* v. *State Tax Commission of Maryland,* supra, are beside the point when consideration is given to the incidence of the tax in death duty cases. The "succession" or "transfer" in Massachusetts does not take effect in Maine, and is not governed by the laws of Maine. The excisable occasion is the "transfer," i. e., the "succession". Can two distinct laws govern? If the succession, which is the basis, the incidence, of the tax, does not occur in Maine, then Maine may not tax what is not in its jurisdiction. It is not stock that is being here taxed, but the "transfer" by succession. The transfer may be excised only by the state whose laws fasten upon the thing taxed, which is the "transfer" upon death.

In this day ownership of stock in a corporation or of bonds issued by a corporation are not confined merely to those domiciled within the state of incorporation. The ownership of stock and of bonds is scattered everywhere. Of course, in respect of bonds, this Court has held in *State Tax on Foreign-Held Bonds,* 15 Wall. 300, that the state having jurisdiction of the debtor could not impose an *ad valorem* personal property tax on the bond issued, but that the bond was cognizable for taxation only in the state of the creditor, that is the bondholder. This Court has now held similarly in respect of death duties (*The Farmers' Loan and Trust Company* v. *Minnesota,* supra).

The rules applying to this species of intangibles should apply with equal force to stocks. Both are intangibles, and both represent the asset or wealth of the owner. Public policy compels to this conclusion; the trend of the cases indicate it; and economic needs in the present day of world-wide business demand it.

Two Taxes by Two Different States Upon One Succession Violates the Fourteenth Amendment.

The Constitution of the United States must be construed in the light of present day conditions in the consideration of the application of the laws to it. It is not a fixed and inflexible rule, incapable of elasticity or of being susceptible of adaptation to changing conditions and the development in modern thought and science. As Judge Learned Hand said in *Daniel Reeves, Inc.* v. *Anderson,* 43 Fed. (2d) 679, at p. 682:—

> "Were the Fifth Amendment a remorseless pattern which all legislation must fit, the argument might even so be troublesome; might indeed be conclusive. But constitutional limitations are not indifferent to the occasions of the statutes they affect. They represent a mood rather than a command, that sense of moderation, of fair play, of mutual forbearance, without which states become the prey of faction. They are not the rules of a game; their meaning is lost when they are treated as though they were."

The development of modern business, new economic conditions, was one of the bases of the thought of this Court in *Union Refrigerator Transit Co.* v. *Kentucky,* supra, in holding that the fiction of situs of movables no longer had its application in respect of tangible personalty. Yet the doctrine had come down through many generations that all personal property followed the owner. As mechanical and scientific inventions brought peoples of one quarter of this country into immediate contact with peoples of other quarters, and business ceased to be transacted as a local enterprise but became nation, and even world, wide, this Court held (*The Farmers' Loan and Trust Company* v. *Minnesota*) that intangibles (certainly such as those involved in that case) deserved as much protection from duplicate and multiple taxation as tangible personalty.

In neither the *Frick* case nor the *Rhode Island Trust Co.* case was the question *directly* presented to the Court of the right of the state in which the corporation was organized to impose a transfer inheritance tax in respect of property transferred under and by the laws of another state. The subject of the tax here, as in those cases, was the "transfer" or the "succession". The "transfer" does not take effect in or because of the laws of Maine—but under the laws of Massachusetts. The *Rhode Island Trust Co.* case refused to admit identity of ownership by the corporation and the stockholder. (See also *Delaware Railroad Tax Case*, 85 U. S. [18 Wall. 206] at pp. 229-30; *Eisner* v. *Macomber*, 252 U. S. 189 at pp. 213-214). The shareholder has only rights in law as has a bond owner.

The one thing that controls or should control is what state *has jurisdiction over the transfer* by death of intangible property. The "transfer" or "succession" cannot occur under the laws of two states. Strictly and accurately speaking the taxable occasion is the "transfer". The tax must fasten upon that event, and that event must be within the jurisdiction of, that is controlled by, the state seeking to impose the tax. A tax imposed by any other state would be in violation of the "due process of law" clause of the Fourteenth Amendment.

The "due process of law" clause of the Fourteenth Amendment is not "given a much more extended and artificial signification" (dissenting opinion of Mr. Justice Holmes in *Baldwin* v. *Missouri*, at p. 598) in construing it to cover corporate stocks than could be considered it was given in covering state and municipal bonds. "Due process of law" has no precise (and therefore circumscribed) meaning. Its very generality is its strength and its important service in our constitutional system. The Constitution, drafted in an age of intense personalism and individualism, as applied to conditions and thought then existing, is yet sufficiently flexible and elastic to adapt itself to this day and time—to this complex

financial and mechanical age. It is a living thing, and its meaning and its force must look always to the present and the future.

We think the "due process of law" clause of the Fourteenth Amendment means that the power of a state to impose a tax shall be confined to that property, those persons, acts and businesses, within its borders and over which it has control. We think that a tax upon the "transfer" or "succession" may be imposed only by the state the laws of which govern the succession. An excise upon that event by any other state would be unconstitutional.

It would seem to us that the real issue is not whether there shall be two death duties imposed upon the transfer of corporate stocks, but should be whether the state of incorporation or the state of domicile shall impose the single constitutionally allowable tax.

Since the decision of this Court in *Farmers Loan & Trust Co.* v. *Minnesota* and the cases decided in consequence thereof, the law reviews have frequently discussed the effect and purport of these decisions. A partial list of the many references in the legal periodicals having to do with the taxability, for death duty purposes of corporate stocks, is set out for the convenience of the Court in an appendix to this brief.

POINT II.

The decision of the Supreme Judicial Court of Maine should be reversed.

Respectfully submitted,

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APPENDIX.

List of Articles in Law Reviews.

Extra-Territorial Transfer Taxes on Intangible Property of a Non-Resident Decedent, 30 Columbia Law Review 404, 405, March, 1930.

Inheritance Taxes—Taxation by State of Property Not Within its Jurisdiction, 64 U. S. Law Review, 158, 160-1, March, 1930.

Jurisdiction to Tax Intangibles, 43 Harvard Law Review, 792, 797, March, 1930.

Constitutional Law—Taxation of Intangible Property, R. D. Ray, 15 Cornell Law Quarterly, 457, 464, April, 1930.

Inheritance Taxes on Shares of Non-residents at Corporate Domicile, Harry Rockwell, 8 N. C. Law Review 318, 321-3, April, 1930.

The Taxable Situs of Intangibles, J. M. Wisdom, 4 Tulane Law Review 469, 475-6, April, 1930.

Taxation, Power of Obligor State to Tax Inheritance, 28 Mich. Law Review 916, 917, April, 1930.

Application of Ohio Inheritance Tax to Intangibles of Non-resident Decedents, T. G. Gutting, 4 University Cincinnati Law Review, 398, 405-6, May, 1930.

Constitutional Law, Jurisdiction to Tax, 18 Georgetown Law Journal 364, 372-3, May, 1930.

The 14th Amendment in its Relation to State Taxation of Intangibles, 18 Cal. Law Review 345, 357-8, May, 1930.

Taxation, Constitutional Law, Situs of Bonds, 5 Washington Law Review 132, June, 1930.

Taxation, Jurisdiction to Tax Intangibles, 3 So. Cal. Law Review 428, 435, June, 1930.

Jurisdiction to Tax Intangibles, Multiple Taxation Being Avoided, Morris Anapolsky, 10 Boston University Law Review, 423, 427-9, June, 1930.

Double Taxation and State Inheritance Taxes, Lyle W. Ohlander, 8 Nat'l Income Tax Magazine 253, July, 1930.

Death Taxes, Recent Statutory and Judicial Solutions of Multiple Taxation, L. Brady, 16 American Bar Association Journal 532, 533, August, 1930.

Power of the States to Tax Intangibles or their Transfer, J. C. Peppin, 18 Cal. Law Review 638, 661-71, September, 1930.

Taxation, Jurisdiction to Tax Intangibles, 29 Mich. Law Review, 93, 97-8, November, 1930.

Double Inheritance Taxation of Intangibles, 40 Yale Law Journal, 99, 104-5, November, 1930.

Tendencies in the Taxation of Intangibles, Chas. Lowndes 17 Va. Law Review 146, 159, December, 1930.

Inheritance Taxation, Jurisdiction to Tax Intangibles, 15 Minn. Law Review 254, January, 1931.

Ohio Inheritance Tax in Relation to Bank Deposits and Stock Ownership of Non-resident Decedents, T. G. Gutting, 5 University of Cincinnati Law Review 245, 246, March, 1931.

Recent Developments in the Law of Inheritance Taxation, Lyle W. Ohlander, 9 Tax Magazine 283-4, August, 1931.